

STARE DECISIS AND TECHNIQUES OF LEGAL REASONING AND LEGAL ARGUMENT

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INTRODUCTION

It gives away no secret to observe that lawyers have their own unique discipline and approach to the resolution of legal problems. Not surprisingly, there are laws about determining the law. One of the most important of these laws is the law of precedent or stare decisis. That doctrine and its significance in practical terms are the subject matters of this paper. This paper is also about how a lawyer in everyday practice answers a legal question and how that lawyer evaluates and formulates legal arguments. The paper is only to a very limited extent concerned about the practical problems of how to find or look up the law; rather, the concern is how a lawyer should deal with the authorities that he or she finds. Because different legal systems have different approaches to the proper way of deciding a legal point, the perspective will be Canadian and primarily that of Ontario.

THE DOCTRINE OF STARE DECISIS

What is the doctrine of precedent or of stare decisis? Professor Gall described it in the following terms:

“The operation of the doctrine of stare decisis is best explained by reference to the English translation of the Latin phrase. “Stare decisis” literally translates as “to stand by decided matters”. The phrase “stare decisis” is itself an abbreviation of the Latin phrase “stare decisis et non quieta movere” which translates as “to stand by decisions and not to disturb settled matters”.

Basically, under the doctrine of stare decisis, the decision of a higher court within the same provincial jurisdiction acts as binding authority on a lower court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction. Second, the degree of persuasiveness is dependent upon the level of court which decided the precedent case in the other jurisdiction. Other factors include the date of the precedent case, on the assumption that the more recent the case, the more reliable it will be as authority for a given proposition, although this is not necessarily so. And on

some occasions, the judge's reputation may affect the degree of persuasiveness of the authority.¹

In *Learning the Law* (9th ed. 1973), Glanville Williams describes the doctrine in practical terms:

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.

The ratio decidendi [reason of deciding] of a case can be defined as the material facts of the case plus the decision thereon. The same learned author² who advanced this definition went on to suggest a helpful formula. Suppose that in a certain case facts A, B and C exist, and suppose that the court finds that facts B and C are material and fact A immaterial, and then reaches conclusion X (e.g. judgment for the plaintiff, or judgment for the defendant). Then the doctrine of precedent enables us to say that in any future case in which facts B and C exist, or in which facts A and B and C exist the conclusion must be X. If in a future case A, B, C, and D exist, and the fact D is held to be material, the first case will not be a direct authority, though it may be of value as an analogy.³

It follows from William's analysis that the addition of fact D to a future case means that conclusion X may or may not follow. In other words, the presence of a new fact D may have the effect of distinguishing the future case from the precedent or conversely the precedent may be extended to apply to the future case.

There is considerable literature about whether the doctrine of stare decisis is a good or bad one⁴ but, the doctrine is usually justified by arguments which focus on the desirability of stability and certainty in the law and also by notions of justice and fairness. Benjamin Cardozo in his treatise, *The Nature of the Judicial Process* stated:

"It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights."⁵ Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.⁶

In *Sweney v. The Department of Highways*,⁷ Middleton J.A. for the Ontario Court of Appeal stated:

But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view that Judge would take on a consideration of the matter, without any regard to previous decisions.⁸

That the doctrine of stare decisis is related to justice and fairness may be appreciated by considering the observation of American philosopher William K. Frankena as to what constitutes injustice:

The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group; and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged.⁹

The critics of the doctrine accept it as the general rule but chafe under it when the staleness of old law leads to unfairness and injustice. For example, Lord Denning, the former Master of the Rolls has argued:

If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. Just as the scientist seeks for truth, so the lawyer should seek for justice. Just as the scientist takes his instances and from them builds up his general propositions, so the lawyer should take his precedents and from them build up his general principles. Just as the propositions of the scientist fail to be modified when shown not to fit all instances, or even discarded when shown in error, so the principles of the lawyer should be modified when found to be unsuited to the times or discarded when found to work injustice.¹⁰

STARE DECISIS AND THE HIERARCHY OF THE COURTS

Keeping with the practical approach of this paper, we will now leave aside this debate and consider the practical problems of dealing with the doctrine as it exists for the practising lawyer. Let us then consider the example of a lawyer preparing legal argument for court.

The lawyer will be appearing before a particular court and the first thing that the lawyer must do is to note the rank of that court in the hierarchy of courts. This is necessary for two reasons: first, because a higher ranking court is not bound to follow the decision of a lower court and second, because some courts do not apply the rule of stare decisis with respect to their own prior decisions.

While it might be thought that it would not be difficult to decide this question of ranking, there are in fact some problems because the hierarchy and the attitude of various courts have changed from time to time. For example, for Canada, appeals to the Privy Council in criminal matters were abolished in 1933¹¹ and it was only in 1949 that all Canadian appeals to the Privy Council were abolished.¹² In Ontario, from 1895 to 1931 but not afterwards, there was a section of the *Judicature Act* which obliged a Judge of the High Court not “to disregard or depart from a prior known decision of any other judge of co-ordinate authority on any question of law or practice without his concurrence.”¹³ Further, perhaps by reason of the abolition of appeals to the Privy Council or perhaps because of the example of the House of Lords which in 1966 announced that it would reverse itself in proper cases¹⁴ or perhaps because of the maturing of Canadian jurisprudence, the Supreme Court of Canada has relatively recently reassessed its own position on the effect of its own prior decisions. In light of these changes, the current position for Ontario jurisprudence appears to be as follows: The Supreme Court of Canada is not bound to follow its own prior decisions or the decisions of the Privy Council.¹⁵ As Professor Gordon Bale has noted:

*The Supreme Court can no longer be content to say that the case is governed by an earlier decision either of its own or of the Privy Council unless the decision provides the proper reconciliation of the competing interests which are involved.*¹⁶

All Canadian courts are bound to follow a precedent of the Supreme Court of Canada¹⁷ and any pre-1949 decision of the Privy Council which has not been overruled by the Supreme Court of Canada. A minority opinion of the Supreme Court of Canada is, however, not binding.¹⁸

The Ontario Court of Appeal is not bound to follow a decision of the appellate court of another province.¹⁹

The Ontario Court of Appeal will generally be bound by its own prior decisions unless the liberty of the subject is involved or unless the prior decision was given per incuriam, that is, inadvertently without consideration of an applicable authority or statutory provision.²⁰ It should be noted by comparison that appellate courts in certain other provinces have allowed themselves greater freedom in overruling their own prior decisions.²¹

All Ontario provincial courts lower than the Court of Appeal are bound to follow a decision of the Ontario Court of Appeal.²² A Divisional Court decision as a decision of an intermediate court of appeal would bind lower courts. (It should be noted that the Divisional Court also sits as a court of first instance.)

All Ontario provincial courts are not bound by the decisions of the appellate courts of other provinces or by decisions of the Federal Court of Appeal.²³

A decision of a court of co-ordinate jurisdiction is not binding²⁴ although where there is conflict it may be appropriate to refer the case to the Court of Appeal.²⁵ It should be noted that in certain circumstances, the District Court may have co-ordinate jurisdiction with the

High Court and not be obliged to follow the decision of the otherwise higher court.²⁶ Similarly, it seems that with respect to procedural matters, the Master's Office and the District Court may be considered to be co-ordinate courts.

While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to stare decisis. In the case of *R. v. Nor. Elec. Co.*,²⁷ McRuer C.J.H.C. stated:

I think Hogg J. stated the right common law principle to be applied in his judgment in Rex ex rel. McWilliam v. Morris, [1942] O.W.N. 447 at 448-9, where he said: "The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary..."

I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular judge.

LEGAL ARGUMENT WHEN THERE IS A PRECEDENT

Thus noting the court ranking of the judge before whom the lawyer will be appearing and guided by the doctrine of stare decisis, the lawyer will then prepare his or her argument. Usually, the best position for the lawyer occurs when there is a precedent case supporting his or her client's case. The lawyer will then argue that the court is either bound, or that the court, if not actually bound, ought to be persuaded by the precedent case to find in the client's favour. In his or her research, the lawyer will therefore look for cases with results which support the client's position and the lawyer will prepare to argue that the ratio decidendi of those precedent cases covers the facts of the case at bar. However, just locating and evaluating the prospects of precedent cases is not easy since it is often difficult to determine and articulate the authority of a case. Moreover, skill is necessary to analyze and organize the material facts of both the precedent case and the case at bar. That said, more difficult problems of legal reasoning and legal argument occur when the lawyer is unable to find a close case or any case at all or, worse yet, when a case presents itself which appears to be unfavourable. How does the lawyer deal with these problems?

To get around an apparently unfavourable case, there are a number of tools and techniques available to the lawyer. The lawyer may not simply ignore the unfavourable case and hope

that the other side does not discover the authority. This is unethical²⁸ and with respect it may be submitted that it is also unethical and intellectually dishonest for a judge in deciding a case to simply ignore a precedent case which stands in the way of the decision that the judge wants to make. This is not to say that lawyers and judges must deal with every case that remotely touches on a subject but only that there should be an honest effort to play by the rules.

The techniques that are available follow as a consequence of accepting and then manipulating the doctrine of stare decisis. The techniques structure and direct the lawyer's legal reasoning and argument. The following are generally recognized:

The lawyer can argue that the precedent case does not stand for the legal proposition for which it has been cited. In other words, the lawyer articulates the ratio decidendi of the case differently. An example of this may be found in the treatment of the case of *Rivtow Marine Ltd. v. Washington Iron Works*.²⁹ In *The Attorney General for the Province of Ontario v. Fatehi*,³⁰ Estey J. without resolving the difficulties associated with this case observed:

*Nonetheless it must be acknowledged that Rivtow has been variously applied or rejected by the courts of this country, some of whom find in the majority judgment recognition of economic loss and some of whom have found the opposite.*³¹

The lawyer can argue that while the precedent case does articulate the legal proposition for which it has been cited, nevertheless the proposition was obiter dicta (things said by the way). Subject to an exception for considered pronouncements of the law by appellate courts, comments by the judge which are not part of the ratio decidendi are obiter dicta and are theoretically not binding in a subsequent case.³² The exception is that where an appellate court expresses a considered opinion on a point of law then such ruling is binding on the lower courts notwithstanding that it was not absolutely necessary to rule on the point in order to dispose of the appeal.³³ It should be noted that if a judge rests his decision on two different grounds neither can be characterized as obiter dictum.³⁴

he lawyer can argue that while the precedent case does stand for the legal proposition for which it has been cited, the case has been effectively overruled by a decision of a high court or by the introduction of a new statute. Examples of this kind of legal argument will obviously occur after significant decisions of the Supreme Court of Canada. For instance that Court's decision in *Kamloops v. Nielsen*³⁵ did away with the distinction between non-feasance and misfeasance in negligence actions against municipalities and many old cases which turned on that distinction can no longer be relied upon.

The lawyer can argue that while the precedent case does stand for the legal proposition for which it has been cited, the case at bar is different; that is, the cases are factually distinguishable. Glanville Williams suggests that there are two kinds of "distinguishing": restrictive and non-restrictive and states:

Non-restrictive distinguishing occurs where a court accepts the expressed ratio decidendi of the earlier case, and does not seek to curtail it, but finds that the case before it does not fall within this ratio decidendi because of some material difference of fact. Restrictive distinguishing cuts down the expressed ratio decidendi of the earlier case by treating as material to the earlier decision some fact, present in the earlier case, which the earlier court regarded as immaterial.

An example of restrictive distinguishing may be noted in the House of Lords decision in *Peabody Fund v. Sir Lindsay Parkinson Ltd.*,³⁶ where the Court restricted the application of *Anns v. Merton London Borough*.³⁷ The *Anns* case is cited as authority for the proposition that a municipality may be liable in negligence where it fails to properly inspect building plans. In the *Peabody Fund* case, by defining the duty of the municipality as being owed to owners and occupiers threatened with the possibility of injury to safety or health, the House of Lords specified and made less general, the scope of the municipality's responsibility as it had been defined in the *Anns* case. In the result, the Court did not allow a claim by the developer of a housing project who suffered damages when the municipality's drainage inspector failed to point out that the drainage system was not being installed in accordance with the approved design.³⁸ Thus, in *Peabody Fund* the element of restrictive distinguishing is the introduction of the requirement of the possibility of injury to safety or health.

An example of non-restrictive distinguishing may be noted in the Supreme Court of Canada decision in *Town of the Pas v. Porky Packers Ltd.*³⁹ In this case, the Court noted that the authority of *Hedley Byrne Co. Ltd. v. Heller*⁴⁰ required the plaintiff in a negligent misrepresentation claim to show that he relied on the skill and judgment of the party from whom he had received incorrect information. In the *Porky Packers* case the plaintiff had received incorrect zoning advice from municipal officials but the plaintiff's representative was a former municipal council member who had more expertise in planning matters than the officials. In these circumstances, there could be no reliance and the doctrine or authority of *Hedley Byrne* by its own criteria was not available. The plaintiff's claim was dismissed. The material fact of the plaintiff's lack of reliance provided the element for non-restrictive distinguishing of *Hedley Byrne*.

Where the case being relied upon has a built in public policy factor, the lawyer who wishes to distinguish the case may argue that public policy has changed and while the legal principle of the precedent case is still good law, it is distinguishable because of the change of circumstances. The possibility of this type of argument was noted in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*,⁴¹ an important case with respect to the principle that contracts in restraint of trade may be voidable on grounds of public policy. In his judgment in this case, Lord Watson noted:

*A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.*⁴²

The lawyer can argue that while the precedent case does stand for the legal proposition for which it has been cited, there is another precedent of equal weight which stands for the opposite proposition. The lawyer then goes on to argue that it is that other case which the court should follow. This type of argument is related to but in the end result different from the “per incuriam argument” because it does not necessarily challenge either decision as having been given per incuriam. The rule is rather that the court may decide which one of the conflicting decisions to follow. Interestingly and as will be seen in a somewhat ironical way, the availability of this rule in Ontario is itself an example of the rule. The legal argument follows. The 1876 Ontario appellate decision of *Fisken et al. v. Meehan*⁴³ is authority for the proposition that where there are conflicting decisions of equal weight the court should follow the more recent decision. Lower courts followed the *Fisken et al. v. Meehan* rule in *Bank of Montreal v. Bailey and Bailey*,⁴⁴ and in *Chiwniak v. Chiwniak*,⁴⁵ although in *Chiwniak* Wilson J. described the duty imposed by the rule to be presumptuous.⁴⁶ However, in *Hamilton v. Hamilton*⁴⁷ Middleton J., sitting as a lower court judge, said that where there are conflicting decisions, the lower court judge may follow the decision which commends itself most to him. Unfortunately, Middleton J. does not cite the *Fisken* case and the *Hamilton v. Hamilton* decision may thus be said to have been given per incuriam. But, in 1958 the Court of Appeal decided *Woolfrey v. Piche*.⁴⁸ In that case, LeBel J.A. stated:

...but I am now faced with two conflicting decisions in this Court on the same point, and in that unfortunate state of things I apprehend that I must choose between them as I have done. That is what was done in Young v. Bristol Aeroplane Co., [1944] 1 K.B. 718, where three exceptions to the application of the rule in Velazquez [the stare decisis rule] were stated. One of these (the first incidentally) is that “the court is entitled and bound to decide which of two conflicting decisions of its own it will follow”. [p. 729] There is authority also for the proposition that where two cases cannot be reconciled, the more recent and the more consistent with general principles ought to prevail. See Campbell v. Campbell (1880), 5 App. Cas. 787 at p. 798.⁴⁹[emphasis added]

The *Fisken* decision is again not cited but its principle that the later of two conflicting cases should be followed is acknowledged but qualified by the requirement that the later case be more consistent with general principles. Thus, to the extent that there is any inconsistency between *Fisken v. Meehan* with *Woolfrey v. Piche*, the *Fisken* case directs that *Woolfrey* be followed. If the *Woolfrey* rule is used to resolve any conflict in authority between the cases, it must come down on its own side or it would not be an authority. If there is no inconsistency between the cases because of the qualification or explanation noted by LeBel J.A. then again the *Woolfrey* rule will be followed.

LEGAL ARGUMENT WHEN THERE IS NO BINDING PRECEDENT

The above seven types of legal argument are the principle techniques used to get around an apparently binding precedent and we can turn next to the problem of not being able to find a

precedent case. Because there is considerable room for imagination and creativity in responding to this problem, it is more difficult to identify the main techniques. Nevertheless, some typical responses may be identified. Below we will consider three classical types of legal reasoning used in these circumstances. Again the doctrine of stare decisis, this time in spirit, may be noted.

Where a lawyer cannot find a binding precedent, he or she may rely on a non-binding precedent from another jurisdiction. While not obliged to do so, the court may be impressed with or be persuaded by the reasoning and be prepared to adopt the rule established by the foreign case. However, care must be taken in employing this technique because it often necessitates reviewing the foreign law to determine whether there may be underlying differences in principles which qualify or which may diminish the persuasiveness of the foreign case. For example, decisions on the *American Bill of Rights* will obviously be important and helpful in interpreting our own *Charter of Rights and Freedoms*. However, it must not be lost sight of that there is no provision in the *American Constitution* comparable to the provision in our *Charter* that the rights set out “are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁵⁰

Where a lawyer cannot find a binding precedent, he or she may form a legal argument from first principles. This approach identifies legal principles from decided cases and argues that while the factual circumstances of the cases may appear different, analytically they are the same. This kind of legal argument is often used with respect to determining the measure of damages. For example, without any reference to its particular facts, *Wertheim v. Chicoutimi Pulp Co.*⁵¹ is often cited as authority for the legal principle that where there is a breach of contract then as far as money can do so, the injured party is to be placed in as good a position as if the contract had been performed. The general principle is then applied to the particular facts of the immediate case. This type of approach may be noted also with respect to the issue of liability; for example, *Hedley Byrne & Co. Ltd. v. Heller, supra*, has frequently been cited as applying to fact situations which do not remotely resemble the facts of that case. This kind of argument does not purport to extend or develop the law; rather, the sense of it is just the opposite. The underlying premise is that the judge will be applying and will not be departing from decided law. The spirit of stare decisis may be noted here.

Where a lawyer cannot find a precedent he or she can go beyond first principles and instead develop an argument that the decided cases have evolved to a general principle which covers the immediate case. This is a very sophisticated and creative type of argument. It is the kind of argument in which common law lawyers and judges take particular pride. It is this type of argument that can be identified in the majority judgment of Lord Atkin in *McAlister (or Donoghue) v. Stevenson*.⁵² In that case, there were two strong dissenting judgments of Lord Buckmaster and Lord Tomlin and their legal argument was that the plaintiff's claim did not come within the reach of the established authorities but represented a new type of claim. Lord Atkin's response was that while the decided cases might each examine particular types of liability, there must be a common rationale. His Lordship stated:

*At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.*⁵³

His Lordship then went on to complete his famous speech which is the foundation of the modern law of negligence. In his approach, we can again note the spirit of stare decisis. Lord Atkin did not ignore the precedents. Instead he found within them an underlying principle which he then applied. In a sense, Lord Atkin looked backward before he moved the law forward. Further, his argument was not based on any assertion that the principle he was articulating was the next logical step in the law. Indeed, an appeal to pure logic is difficult because established precedents may prevent the law from developing as a matter of logical progression. Lord Halsbury in *Quinn v. Leathen*⁵⁴ stated:

*A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*⁵⁵

Thus, *McAlister (or Donoghue) v. Stevenson* does not offend the letter or spirit of the doctrine of stare decisis and provides a classic example of legal reasoning and legal argument in circumstances where there was no near precedent for the case.

CONCLUSION

This paper has focused on one aspect of legal reasoning and argument, that of the use of precedent. However, it must be conceded that stare decisis is only a part of this topic. There is much more. There are substantive rules for the interpretation of statutes and there are special rules and considerations when the statute is a tax act or a criminal code or a constitutional document. There are special and often difficult rules for the interpretation of contracts and testamentary instruments. There are unique considerations when principles of the law of equity are involved and problems caused by the evidentiary rules of onus of proof or of rebuttable and irrebuttable presumptions. yet, while the multitude of these rules provides the lawyer with a large variety of other tools and techniques for legal reasoning and legal argument, it also has to be conceded that stare decisis continues to play the pivotal role.

ENDNOTES

1. Gerald L. Gall, *The Canadian Legal System*, 2nd ed. (Toronto: Carswell Legal Publications, 1983) at 220. This text includes an excellent bibliography on this subject including a lengthy list of cases and articles.
2. The reference is to Goodhart, "Determining the Ratio Decidendi of a Case", *Essays in Jurisprudence and the Common Law* (1931) 1.
3. Glanville Williams, *Learning the Law*, 9th ed. (1973) at 67-68. See also S.M. Waddams, *Introduction to the Study of Law*, 2nd ed. (Toronto: Carswell, 1983) at 102-118.
4. For example, The Rt. Hon. Lord Denning, *The Discipline of the Law* (London: Butterworths, 1979) at 285-314; Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1921) at 9-50; Friedman, "Stare Decisis at Common Law and under the Civil Code" (1953) 31 *Can. Bar Rev.* 722; MacGuigan, "Precedent and Policy in the Supreme Court of Canada" (1967) 45 *Can. Bar Rev.* 627; Weiler, "Legal Values and Judicial Decision Making" (1970) 48 *Can. Bar Rev.* 1 and Bale, "Casting Off the Mooring Ropes of Binding Precedent" (1980) 58 *Can. Bar Rev.* 255.
5. The quote is from W.G. Miller, *The Data of Jurisprudence*, at 335.
6. See Cardozo, *supra*, note 4 at 33-34.
7. [1933] O.W.N. 783 (C.A.).
8. *Ibid.* at 783-4.
9. William K. Frankena, *Ethics*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1973) at 49.
10. See Denning, *supra*, note 4 at 292.
11. 23 & 24 Geo. V, c. 53, s. 17.
12. 13 Geo. VI, c. 37.
13. See for example, R.S.O. 1927, c. 88, s. 31(2).
14. *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234 (H.L.).
15. *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43; *Min. of Indian Affairs & Northern Dev. v. Ranville* (1982), 141 D.L.R. (3d) 577 (S.C.C.), rev'd (1980), 115 D.L.R. (3d) 512 (Ont. C.A.) which aff'd (1980), 107 D.L.R. (3d) 632 (Ont. S.C.).
16. See Bale, *supra*, note 4 at 260.
17. *Wolf v. The Queen* (1974), 47 D.L.R. (3d) 741 (S.C.C.).
18. *Re Ward* (1975), 5 O.R. (2d) 35 (Div. Ct.).
19. *Wolf v. The Queen*, *supra*, footnote 9.
20. *R. v. Eakins*, [1943] O.R. 199 (C.A.); *R. v. McInnis* (1973), 1 O.R. (2d) 1 (C.A.); *Re Hardy Trust*, [1955] 5 D.L.R. 10 (Ont. C.A.); *R. v. Godedarov* (1974), 3 O.R. (2d) 23 (C.A.); *Ex parte Pickett* (1976), 12 O.R. (2d) 195 (C.A.).
21. See Gall, *supra*, note 1 at 226, and authorities there cited.
22. *Re Canada Temperance Act: Re Consolidated Rule of Practice*, [1939] O.R. 570, aff'd (sub. nom. *A.G. Ont. v. Can. Temperance Federation*) [1946] A.C. 193 (P.C.); *R v. Morris*, [1942] O.W.N. 447.

23. *Bedard v. Isaac*, [1972] 2 O.R. 391. Rev'd on other grounds (*sub.nom. Issac v. Bedard*) 38 D.L.R. (3d) 481; *Re Commonwealth of Virginia and Cohen (No. 2)* (1973), 1 O.R. (2d) 262; *R. v. Guertin*, [1971] 2 O.R. 505 (Co. Ct.); *R. v. Beaney*, [1969] 2 O.R. 71 (Co. Ct.); *Norris v. Hamilton*, [1943] O.W.N. 566; *Xerox Can. Inc. v. Neary* (1984), 43 C.P.C. 274 (Ont. Prov. Ct.).
24. *R. v. Nor. Elec. Co.*, [1955] O.R. 431; *R. v. Groves* (1977), 17 O.R. (2d) 65.
25. See *R. v. Nor. Elec. Co.*, *supra*, note 25 and Rule 22, *Ontario Rules of Civil Procedure* and formerly s. 34, *Judicature Act*, R.S.O. 1980, c. 223.
26. *Masse v. Dietrich*, [1971] 3 O.R. 359.
27. [1955] O.R. 431.
28. Law Society of Upper Canada, *Professional Conduct Handbook*, Rule 8, Commentary 1(h) and authorities there cited.
29. [1974] S.C.R. 1189.
30. (1985), 15 D.L.R. (4th) 132 (S.C.C.).
31. *Ibid.* at 139.
32. *Landreville v. Gouin* (1884), 6 O.R. 455.
33. *R. v. Sellars*, [1980] 1 S.C.R. 527; *Ottawa v. Nepean*, [1943] 3 D.L.R. 802 (Ont. C.A.); *Re McKibbin and R.* (1981), 34 O.R. (2d) 185, aff'd 35 O.R. (2d) 124 aff'd on other grounds (*sub nom. R. v. McKibbin*, [1984] 1 S.C.R. 133; *Woloszczuk v. Onyszczak* (1976), 1 C.P.C. 129 (Ont.)).
34. *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, rev'g 17 O.L.R. 436, aff'd [1911] A.C. 120 (P.C.); 6C.E.D. (Ont. 3rd) Courts, para. 389.
35. [1984] 5 W.W.R. 1 (S.C.C.).
36. [1984] 2 W.L.R. 953 (H.L.).
37. [1978] A.C. 728 (H.L.).
38. The law in Canada may be different. See an article by the writer published in the *Advocates' Quarterly*: "Common Law Negligence and the Liability of Governments and Public Authorities".
39. (1976), 65 D.L.R. 1 (S.C.C.).
40. [1963] 2 All E.R. 575.
41. [1894] A.C. 535, and see the discussion in Friedman, *supra*, note 4 at 736-737.
42. [1894] A.C. 535 at 553.
43. (1876), 40 U.C.Q.B. 146.
44. [1943] O.R. 406.
45. [1972] 2 O.R. 64.
46. *Ibid.* at 69.
47. (1920), 47 O.L.R. 359.
48. (1958), 13 D.L.R. (2d) 605.
49. *Ibid.* at 608.
50. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1.
51. [1911] A.C. 301 (P.C.).
52. [1932] A.C. 562 (H.L.).
53. *Ibid.* at 580.
54. [1901] A.C. 495 (H.L.).

55. *Ibid.* at 506.